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In the Supreme Court of the United States

OCTOBER TERM, 1992

FRIKO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to enter a judgment determining petitioner's interest in property located outside the district.

2. Whether petitioner lacked standing because it was merely a straw owner, and the true owner is a fugitive.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19 (1960)	7
Inland Credit Corp. v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977)	7
Republic National Bank v. *United States*, 113 S. Ct. 559 (1992)	9

Statutes and rules:

Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1521, 106 Stat. 4062 (28 U.S.C. 1355)	8
18 U.S.C. 981	2
18 U.S.C. 981(h)	3, 4, 5
31 U.S.C. 5313(a)	2
31 U.S.C. 5324	2
Fed. R. Civ. P:	
Rule 59(e)	4, 6
Rule 60(b)	6
Supplemental Rules for Certain Admirality and Maritime Claims, Rule E(8)	7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1106

FRIKO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-36b) is reported at 971 F.2d 974. The opinion of the district court (Pet. App. 1a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on July 22, 1992. A petition for rehearing was denied on September 22, 1992. Pet. App. 1c. The petition for a writ of certiorari was filed on December 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, a grand jury in the District of New Jersey returned an indictment charging petitioner, along with Johnny Daccarett and others, with money laundering. Daccarett did not appear in the criminal proceeding and became a fugitive. Petitioner was dismissed from the prosecution without prejudice. Pet. App. 3b-4b.

On March 29, 1990, the United States filed an *in rem* complaint in the District of New Jersey seeking forfeiture of a brokerage account and a credit card account held in petitioner's name at Merrill Lynch, Pierce, Fenner & Smith in New York City. The complaint alleged that the accounts were subject to forfeiture under 18 U.S.C. 981 as assets involved in a transaction in violation of 31 U.S.C. 5313(a) or 5324. Specifically, the complaint alleged that the accounts were used to facilitate a money-laundering operation in which Colombian drug money was mailed to the United States, converted into money orders and checks, and deposited back into drug-connected accounts in the United States and other countries. After the complaint was filed, the United States seized the two accounts. Pet. App. 1a-2a, 3b-4b.

Petitioner, a Panamanian corporation with its principal place of business in Colombia, filed a claim to the accounts. Petitioner contended, *inter alia*, that the United States District Court for the District of New Jersey lacked *in rem* jurisdiction because the seized accounts were located in the Southern District of New York. The United States moved to strike petitioner's claim, arguing (1) that petitioner was a shell corporation controlled by

Johnny Daccarett, a fugitive, and (2) that petitioner lacked standing to assert a claim to the accounts. Pet. App. 3a.

2. The district court denied petitioner's motion to dismiss for lack of jurisdiction and granted the government's motion to strike petitioner's claim. The district court ruled that it had jurisdiction over the accounts under 18 U.S.C. 981(h), which provides that "[i]n addition to the venue provided for in" other provisions of law, forfeiture proceedings under Section 981 "may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which [a related] criminal prosecution is brought." The court concluded that "the district courts of the United States enjoy nationwide jurisdiction over suits brought under 18 U.S.C. § 981, provided that certain venue requirements are met." Pet. App. 5a. Because the government had met the venue requirements by bringing a related criminal prosecution in the District of New Jersey, the court held that it had jurisdiction over the government's forfeiture action. Pet. App. 5a-6a.

The district court also granted the government's motion to strike petitioner's claim. It found that petitioner was wholly controlled by Daccarett and his family and that "[i]t is absolutely clear * * * that the corporation, which has tendered nothing which even suggests that it functions as a legitimate enterprise, is little more than a shell." Pet. App. 8a. For that reason, the court found petitioner's claim barred by the "fugitive disentitlement doctrine," which holds that "a fugitive may not invoke the power of the Court to preserve his or her property in a civil forfeiture

action while at the same time flaunting the Court's criminal processes." Pet. App. 7a. In the alternative, the court held that petitioner lacked standing to assert a claim to the accounts. The court found that petitioner had "produced nothing of substance to establish that it held anything more than legal title to the account[s], and has thus failed to demonstrate that it has standing to contest the forfeiture." Pet. App. 9a.

On May 24, 1991, the district court entered a default judgment in favor of the United States. Pet. App. 5b. Petitioner then filed a motion for reargument of the district court's order striking its claim. Petitioner also asked that the district court reconsider its order granting a default judgment to the government based on petitioner's failure to show a colorable interest in the *res*. In support of its motion, petitioner submitted an affidavit from its Colombian lawyer, who averred that petitioner was formed to facilitate exports by large Colombian exporters and that petitioner had a legal and equitable interest in the seized accounts. On July 31, 1991, the district court denied the motion for reargument as untimely under Fed. R. Civ. P. 59(e). Pet. App. 5b-6b.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1b-36b. The court first held that venue was properly laid under 18 U.S.C. 981(h), which provides for venue in a district in which a *res* is not located if a prior related criminal proceeding has been brought in the district. Pet. App. 10b-15b. The court held, however, that Section 981(h) did not authorize the district court in New Jersey to exercise *in rem* jurisdiction over brokerage accounts

located in New York. The court of appeals noted that the district court could obtain *in rem* jurisdiction over a *res* located outside of its borders only if a statute provided for service of process outside the territorial boundaries of the district. The court held that Section 981(h) was a venue statute that did not provide for service of process outside the district's borders. Pet. App. 16b-17b. Thus, the court of appeals concluded, the district court lacked *in rem* jurisdiction over the *res*. Based on that conclusion, the court of appeals vacated the default judgment in favor of the United States. Pet. App. 24b-25b.

Although declining to find *in rem* jurisdiction in this case, the court of appeals held that the district court could exercise *in personam* jurisdiction to adjudicate the government's rights in the accounts against parties over whom the court had personal jurisdiction. Because the district court had personal jurisdiction over petitioner, the court of appeals held that the district court could determine petitioner's rights in the *res*. Pet. App. 16b-23b.

The court of appeals went on to rule that the district court had correctly determined, based on the evidence before it, that petitioner lacked standing to assert a claim to the *res*. Although petitioner had legal title to the seized accounts, it was merely a straw owner for Johnny Daccarett. The court characterized petitioner's efforts to rebut the government's showing that it was controlled by Daccarett as "feeble" and insufficient to establish petitioner's independent existence. Because Daccarett was a fugitive, the court upheld the district court's decision that petitioner could not assert his claim to the *res*.

The court therefore concluded that, on the record before the district court at the time the district court initially ruled on petitioner's standing, the court properly determined that petitioner lacked standing.

The court did not affirm the district court's decision as to petitioner's standing, however, because it found that the district court had erred in denying petitioner's motion for reargument as untimely. It rejected the district court's determination that the motion had been filed under Rule 59(e). Instead, the court found that because petitioner submitted new evidence with the motion, it should be characterized as a motion under Fed. R. Civ. P. 60(b) to obtain relief from a default judgment. Pet. App. 32b-35b. The court of appeals ruled that the district court had discretion to consider the motion. Pet. App. 35b. Accordingly, the court of appeals remanded to the district court for consideration of petitioner's request that the district court reconsider its decision that petitioner lacked a cognizable interest in the *res*. Pet. App. 36b.

ARGUMENT

1. a. Petitioner contends (Pet. ii, 5-7) that this case presents the question whether a district court may exercise *in rem* jurisdiction if the *res* is located outside the geographical boundaries of the district. Petitioner mischaracterizes the court of appeals' decision. The court of appeals held that the district court did not have *in rem* jurisdiction over the brokerage accounts because the accounts were located outside the district and the district court had no authority to effect service of process on the *res*. Pet. App. 15b-23b. Accordingly, the court vacated the judgment *in rem* determining the government's

rights over the property as against all claimants. The court further held, however, that because the district court had *in personam* jurisdiction over petitioner, it could issue a judgment determining petitioner's rights in the *res*. Pet. App. 24b-25b.

Thus, contrary to petitioner's contention, this case does not present the question whether a district court can exercise *in rem* jurisdiction over a *res* that is not located within the court's geographic boundaries at the outset of the action. Nor is there any merit to petitioner's suggestion that the court of appeals erred in finding *in personam* jurisdiction over petitioner. In *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), this Court held that an *in rem* action brought in one district could be transferred to a district where an *in personam* action was pending against the owner of the *res*. In so ruling, the Court implicitly recognized that a court possessing only *in personam* jurisdiction over the owner of a *res* could adjudicate rights in an action invoking *in rem* jurisdiction. In this case, the government's filing of an *in rem* complaint did not prevent the district court from determining the rights in a *res* of a party over whom the court had *in personam* jurisdiction. See *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148, 1152 (5th Cir. 1977) ("it is proper for us to exercise our jurisdiction *in personam* to correct any errors in the lower court's *in rem* adjudication"). Indeed, petitioner voluntarily

submitted to the *in personam* jurisdiction of the district court. See Pet. App. 23b-24b.[1]

b. Even if petitioner had correctly characterized the court of appeals' decision, its claim would not merit review. On October 28, 1992, Congress enacted the following provision:

> A forfeiture action or proceeding may be brought in—
>
> (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
>
> (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in Section 1395 of this title or any other statute.

Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1521, 106 Stat. 4062 (amending 28 U.S.C. 1355). Under the amended statute, the government would be permitted to bring a civil action in the District of New Jersey to obtain forfeiture of the accounts in New York, even if the *res* was not located in New Jersey at the outset of the action. Thus, the statute resolves the issue on which

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[1] Under Rule E(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which is applicable to *in rem* forfeiture proceedings, a claimant may enter a restricted appearance solely to defend against a claim *in rem*. Petitioner did not enter a limited appearance. Consequently, the district court had *in personam* jurisdiction over petitioner.

petitioner seeks this Court's review and renders his claim of no continuing importance.[2]

c. Petitioner also is incorrect in asserting (Pet. 6-7) that the court of appeals' decision should be reconsidered in light of this Court's decision in *Republic National Bank* v. *United States*, 113 S. Ct. 554 (1992). In *Republic National Bank*, the Court held that "in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the res from the District." *Id.* at 559-560. Instead, the Court ruled, once a district court is vested with *in rem* jurisdiction by the seizure of the *res*, the court of appeals has jurisdiction to rule on an appeal from the district court's judgment even if the losing party fails to take any step to stay the judgment. In this case, in contrast to *Republic National Bank*, the government did not seek to base *in rem* jurisdiction on the presence of the *res* in the district where it brought the forfeiture action. In addition, the court of appeals' decision in this case rests on the district court's *in personam* jurisdiction over petitioner rather than its *in rem* jurisdiction over the *res*. Consequently, *Republic National Bank* is inapposite.

2. a. Petitioner also urges the Court to grant review to determine whether petitioner has standing to assert a claim to the two brokerage accounts. See Pet. 7-11. Because the court of appeals has remanded the case to the district court for further considera-

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[2] Following the court of appeals' decision, the government re-arrested the accounts at issue in this case under the new jurisdictional provisions. Consequently, petitioner's contention may well be moot.

tion of that issue, review by this Court would be premature.

After the district court held that petitioner lacked standing to assert a claim to the *res*, petitioner filed a motion for reconsideration. In support of its motion, petitioner submitted an affidavit of its Colombian attorney setting forth additional information bearing on petitioner's claim that it had a cognizable interest in the seized accounts. Although the district court denied the motion as untimely, the court of appeals held that the motion was timely and remanded to the district court for consideration of petitioner's new evidence. Pet. App. 32b-35b. On remand, petitioner will have another opportunity to demonstrate that it has standing to assert a claim to the accounts at issue. If petitioner again fails to convince the district court, it may raise its standing claim on appeal from the district court's decision.

b. In any event, petitioner's contention is without merit. The district court's decision was based on its determination that petitioner was the alter ego of Johnny Daccarett, a fugitive in a related criminal prosecution pending in the District of New Jersey. The court applied the "fugitive disentitlement doctrine" and held that Daccarett had no right to assert a claim to the *res* through a straw entity. Pet. App. 7a-9a. The court further concluded that "the same result is compelled under analogous principles relating to standing." Pet. App. 9a.

The court's finding that petitioner was a straw owner of the accounts is amply supported by the record. The government presented evidence that Daccarett or members of his family are petitioner's

president, secretary, and treasurer, and that Daccarett alone signed the corporate resolution authorizing petitioner to file its claim to the *res*. Pet. App. 7a, 30b. The government also submitted evidence tending to show that petitioner was involved in money laundering. In response, petitioner came forward with evidence showing only that petitioner had been incorporated and had opened the accounts at issue. As the court of appeals held, petitioner's "documentary evidence verifies its formation as a corporation, its power to open the seized accounts and to litigate this claim, but it does not tend to show that [petitioner] itself conducts any kind of trade or business beyond holding legal title to various accounts." Pet. App. 30b-31b. On that record, the district court properly held that petitioner was not entitled to assert a claim to the seized accounts.[3]

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[3] Petitioner cites (Pet. 9-10) several judicial decisions in which courts have discussed the standard for determining whether a party has standing to assert a claim in a civil forfeiture proceeding. In this case, the issue is not whether petitioner has shown that it has sufficient interest in the *res*, but instead whether petitioner is a straw entity for a fugitive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

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